

Louisiana's New Joint Custody Law

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NOTES

LOUISIANA'S NEW JOINT CUSTODY LAW

A separation or divorce proceeding traditionally has resulted in an award of sole custody of any minor children of the marriage to one of the parents, even when both parents have been willing and fit to have custody.¹ This result may be unfair to the child, the non-custodial parent, and even the custodial parent, who may have difficulty bearing the burden of sole custody.² Many courts and legislatures have decided that it is sometimes better to place the child in the custody of both parents by awarding joint custody.³ This solution has been accepted by the Louisiana Legislature in a recently enacted law which establishes a preference for joint custody.⁴ The

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1. See, e.g., *Cooley v. Cooley*, 411 So. 2d 750 (La. App. 3d Cir. 1982); *Jowers v. Jowers*, 393 So. 2d 790 (La. App. 2d Cir. 1981); *Kerr v. Kerr*, 349 So. 2d 913 (La. App. 1st Cir. 1977).

2. See M. ROMAN & W. HADDAD, *THE DISPOSABLE PARENT; THE CASE FOR JOINT CUSTODY* 73-79 (1978); Comment, *Joint Custody in Louisiana*, 43 LA. L. REV. 85, 98-99 (1982).

3. See, e.g., *Beck v. Beck*, 86 N.J. 480, 432 A.2d 63 (1981); *Perotti v. Perotti*, 78 Misc. 2d 131, 355 N.Y.S.2d 68 (Sup. Ct. 1974); CAL. CIV. CODE § 4600.5 (Supp. 1982); MICH. COMP. LAWS ANN. § 722.26a (Supp. 1982).

4. 1982 La. Acts, No. 307, § 1. This Act amended LA. CIV. CODE arts. 146, 157, & 250 and LA. CODE CIV. P. art. 4262.

LA. CIV. CODE art. 146 provides:

A. If there are children of the marriage whose provisional custody is claimed by both husband and wife, the suit being yet pending and undecided, custody shall be awarded in the following order of preference, according to the best interest of the children:

(1) To both parents jointly. The court, shall, unless waived by the court for good cause shown, require the parents to submit a plan for implementation of the custody order, or the parents acting individually or in concert may submit a custody implementation plan to the court prior to issuance of a custody decree. Such plan may include such considerations as the following:

(a) Domiciliary arrangements for the child or children.

(b) Rights of access and communication between the respective parents and the child or children.

(c) Child support, if appropriate to the economic circumstances of the parents.

(d) Any other matter deemed in the best interest of the child or children.

(2) To either parent. In making an order of custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex. The burden of proof that joint custody would not be in a child's best interest shall be upon the parent requesting sole custody.

new law deserves analysis as it significantly changes Louisiana custody law.

(3) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(4) To any other person or persons deemed by the court to be suitable and able to provide an adequate and stable environment.

B. Before the court makes any order awarding custody to a person or persons other than a parent without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child. Allegations that parental custody would be detrimental to the child, other than a statement of that ultimate fact, shall not appear in the pleadings.

C. There shall be a rebuttable presumption that joint custody is in the best interest of a minor child unless:

(1) The parents have agreed to an award of custody to one parent or so agree in open court at a hearing for the purpose of determining the custody of a minor child of the marriage; or

(2) The court finds that joint custody would not be in the best interest of the child.

For the purpose of assisting the court in making a determination whether an award of joint custody is appropriate, the court may direct that an investigation be conducted.

D. For purposes of this Article, "joint custody" shall mean the parents shall share the physical custody of children of the marriage, subject to any plan of implementation effected pursuant to Paragraph A of this Article, and shall enjoy the natural cotutorship of such children in accordance with Article 250. Physical care and custody shall be shared by the parents in such a way as to assure a child of frequent and continuing contact with both parents. An award of joint custody obligates the parties to exchange information concerning the health, education, and welfare of the minor child; and, unless allocated, apportioned, or decreed, the parents or parties shall confer with one another in the exercise of decision-making rights, responsibilities, and authority.

E. Any order for joint custody, or any plan of implementation effected pursuant to Paragraph A of this Article, may be modified or terminated upon the petition of one or both parents or on the court's own motion, if it is shown that the best interest of the child requires modification or termination of the order. The court shall state in its decision the reasons for modification or termination of the joint custody order if either parent opposes the modification or termination order.

F. Any order for the custody of a minor child of a marriage entered by a court in this state or in any other state, subject to jurisdictional requirements, may be modified at any time to an order of joint custody in accordance with the provisions of this Article.

G. A custody hearing may be held in private chambers of the judge.

H. Notwithstanding any other provision of law, access to records and information pertaining to a minor child, including but not limited to medical, dental, and school records, shall not be denied to a parent because the parent is not the child's custodial parent.

LA. CIV. CODE art. 157 provides:

A. In all cases of separation and divorce, and change of custody after an original award, permanent custody of the child or children shall be granted to the parents in accordance with Article 146.

B. If subsequent to the granting of a divorce or separation one of the parties to the marriage dies and is survived by a minor child or children of the marriage,

Act 307 of 1982 amended Civil Code articles 146 and 157. The standards in amended article 146 apply to all custody cases, either directly, through the operation of article 146, or indirectly, through the reference in article 157 to article 146.⁵ Amended article 146 preserves the requirement that custody be awarded in accordance with the best interest of the child, but it also establishes an order of preference among the possible custody awards.⁶ There is a rebuttable presumption that joint custody is in the best interest of the child,⁷ and as a result, joint custody is first in the order of preference.⁸ If the presumption in favor of joint custody is inapplicable, or if a parent requesting sole custody discharges his burden of proof that joint custody is not in the child's best interest, sole custody should be awarded.⁹ The third and fourth preferences allow the court to award custody to a nonparent, a possibility which previously was not legislatively recognized.¹⁰ Custody can be awarded to a nonparent, however, only if the court finds that an award to a parent would be detrimental to the child.¹¹ In addition to the new provisions for custody awards, amended article 146 states that a noncustodial parent shall not be denied access to important records and information pertaining to his minor child because he is not the child's custodial parent.¹² Thus, besides establishing a preference for joint custody and allowing custody awards to nonparents, the new law redefines the limits of sole custody.

Past Jurisprudence

Prior to legislation expressly permitting it,¹³ Louisiana courts prohibited arrangements similar to joint custody. In the 1933 case of

the parents of such deceased party may have reasonable visitation rights to the child or children of the marriage during their minority, if the court in its discretion finds that such visitation rights would be in the best interests of the child or children.

5. Article 157 states that permanent custody shall be awarded "*To the parents in accordance with article 146.*" (emphasis added). Although article 146 allows custody *pending the litigation* to be awarded to nonparents, the apparently limiting language of article 157 might be construed to prevent awards of *permanent* custody to nonparents. On the other hand, the limitation in article 157 may have been an oversight, the true legislative intent being to incorporate all of article 146 into article 157.

6. LA. CIV. CODE art. 146(A).

7. LA. CIV. CODE art. 146(C).

8. LA. CIV. CODE art. 146(A)(1).

9. LA. CIV. CODE art. 146(A)(2).

10. LA. CIV. CODE arts. 146 & 157 (prior to 1982 amendments). Custody awards to nonparents were recognized in the jurisprudence. See *infra* notes 81 & 82 and accompanying text.

11. LA. CIV. CODE art. 146(B).

12. LA. CIV. CODE art. 146(H).

13. Act 283 of 1981 amended Civil Code articles 146 and 157 to permit joint custody for the first time in Louisiana.

Newson v. Newson,¹⁴ the original custody decree had granted each of the parents custody of the child for alternating periods of six months. The Louisiana Supreme Court rejected that arrangement, stating that custody of a child following separation should be granted to only one of the parents. The court reasoned that alternating custody would result in a division of parental authority, which was not in the best interest of the child. After *Newson*, "divided" or "part time" custody was considered to be prohibited.¹⁵ More recent cases disallowed liberal visitation that was said to amount to divided custody.¹⁶ The reasoning of *Newson* was also reflected in several cases which indicated that liberal visitation would be disallowed only when it resulted in a division of parental authority.¹⁷ Thus, the new statute's presumption that joint custody is in the best interest of the child is a clear derogation from prior Louisiana jurisprudence. Therefore, Louisiana courts may be inclined to give the joint custody provisions of amended article 146 a restrictive interpretation.¹⁸

Further evidence that joint custody is contrary to judicially developed standards for child custody cases is found in the reliance on stability of environment as a factor in determining the best interest of the child.¹⁹ In a 1980 change of custody case, *Bordelon v. Bordelon*,²⁰ the supreme court said, "Generally, it might not be in the best interest of a child to be regularly moved from parent to parent."²¹ Although the court also noted that the stability factor must be weighed with the other relevant factors in determining what is in the child's best interest, the court concluded that "the stability factor [weighed] heavily in favor of the mother, since she was the parent most intimately in-

14. 176 La. 694, 146 So. 472 (1933).

15. See *Schexnayder v. Schexnayder*, 343 So. 2d 393 (La. App. 4th Cir. 1977).

16. *Sims v. Sims*, 340 So. 2d 397 (La. App. 2d Cir. 1976); *LeBouef v. LeBouef*, 325 So. 2d 290 (La. App. 4th Cir. 1975); *Litton v. Litton*, 299 So. 2d 458 (La. App. 2d Cir. 1974); *Poole v. Poole*, 270 So. 2d 215 (La. App. 1st Cir. 1972); *Ogden v. Ogden*, 220 So. 2d 241 (La. App. 1st Cir. 1969); *Bush v. Bush*, 163 So. 2d 858 (La. App. 2d Cir. 1964).

17. *D'Armond v. D'Armond*, 405 So. 2d 1231 (La. App. 1st Cir. 1981); *Johnson v. Johnson*, 357 So. 2d 69 (La. App. 4th Cir. 1978); *Doherty v. Mertens*, 326 So. 2d 405 (La. App. 3d Cir. 1976); *Pate v. Pate*, 348 So. 2d 1338 (La. App. 3d Cir. 1977); *Spencer v. Spencer*, 273 So. 2d 605 (La. App. 4th Cir. 1973); *Vinet v. Vinet*, 184 So. 2d 33 (La. App. 4th Cir. 1966); *Holley v. Holley*, 158 So. 2d 620 (La. App. 3d Cir. 1963).

18. In *Scott v. Scott*, 417 So. 2d 489 (La. App. 1st Cir. 1982), the first circuit narrowly construed the joint custody provisions of article 157 because, prior to legislation permitting joint custody, it was prohibited by the jurisprudence. 417 So. 2d at 491-92.

19. See *Bordelon v. Bordelon*, 390 So. 2d 1325 (La. 1980); *Cleeton v. Cleeton*, 383 So. 2d 1231 (La. 1980).

20. 390 So. 2d 1325 (La. 1980).

21. *Id.* at 1329.

volved with raising the child and had only lost custody for a short while in comparison to the child's age."²² This reasoning conflicts with the presumption in favor of joint custody because joint custody necessarily involves the child spending time with two custodial parents who live apart.²³ Hence *Bordelon* indicates that Louisiana courts, as mentioned previously, may tend to give the new joint custody law a restrictive interpretation.²⁴

The Rebuttable Presumption

The fact that Louisiana courts have not favored joint custody is important because the essential provisions of the new law are ambiguous. Whether there will be a significant change in the nature of custody awards depends on how the courts interpret the new law. The interpretation given to the provisions establishing the presumption in favor of joint custody will be especially important. Article 146(C) provides in part: "There shall be a rebuttable presumption that joint custody is in the best interest of a minor child unless: (1) The parents have agreed to an award of custody to one parent . . .; or (2) The court finds that joint custody would not be in the best interest of the child." Although the presumption is very strong, both exceptions can be interpreted broadly so as to limit the applicability of the presumption and diminish the effect of the new law.

The first exception to the presumption in favor of joint custody—the parents have agreed to an award of custody to one parent—can be interpreted two ways. It may mean that the presumption does not apply if the parents agree that joint custody should not be awarded, regardless of which of them is awarded sole custody, or it may mean that the presumption does not apply when one parent acquiesces to the other parent's having custody. The former interpretation should not be followed since it would allow the parents to circumvent the legislative preference for joint custody by agreeing to engage in a sole custody dispute. In light of the past jurisprudence,²⁵ such agreements could easily become common practice, resulting in infrequent application of the presumption in favor of joint custody.

22. *Id.* The supreme court also noted the importance of giving custody to the parent "most intimately involved" with the child's care in *Cleeton v. Cleeton*, 383 So. 2d 1231, 1236 (La. 1980).

23. LA. CIV. CODE art. 146(D).

24. The fact that there have been very few joint custody cases since the joint custody legislation of 1981 is yet another indication that the courts do not favor joint custody. Louisiana courts could have remanded suitable custody cases with directions for the parents to consider joint custody as an alternative. This has been done in other states. See *In Re Marriage of Levin*, 102 Cal. App. 3d 981, 162 Cal. Rep. 757 (1980).

25. See *supra* notes 14-17 and accompanying text.

However, if the latter interpretation is adopted—the presumption does not apply when one parent consents to the other's taking custody—the presumption would still apply in most cases. This interpretation would simply allow the court to disregard the presumption in favor of joint custody when rendering a consent judgment of sole custody.²⁶ Thus, the latter interpretation should be adopted because it is more consistent with the apparent legislative purpose of establishing a preference for joint custody.

The second exception to the presumption in favor of joint custody—the court finds that joint custody would not be in the best interest of the child—is even more problematic. A literal interpretation of the presumption and its second exception suggests that joint custody is presumed to be in the child's best interest unless it is not in the child's best interest. Such a literal interpretation would negate the effect of the presumption in favor of joint custody, since the assumption of fact triggered by the presumption would be contingent upon a determination of that same fact. If the presumption were given such a limited effect, the basis for the preference of joint custody over sole custody would be largely eliminated. Furthermore, the apparent existence of a strong presumption in favor of joint custody would be misleading and potentially harmful to the interests of all parties concerned.

Another interpretation of the second exception is that it merely reaffirms the rebuttable nature of the presumption in favor of joint custody. Under this interpretation the exception is, at best, redundant and, at worst, a point of possible confusion which is also potentially harmful to interested parties.

A third interpretation is that the second exception is intended to allow a court to find that the presumption in favor of joint custody is not applicable even when neither parent has requested an award of sole custody.²⁷ The exception might be considered necessary in this instance since otherwise the presumption would require an award of joint custody.²⁸ This third interpretation is supported by the allowance in article 146 of a court-ordered investigation as to whether joint custody is in the child's best interest. This interpretation preserves the effect of the presumption in favor of joint custody and is consis-

26. The general practice of the courts is to automatically award sole custody to the parent who requests it when the other parent consents to such an award. The practice is justified in that it is probably not in the child's best interest for custody to be awarded to a parent who either cannot or will not seek custody.

27. This would usually occur where the parents were requesting joint custody.

28. Relevant sections of article 146 provide: "custody shall be awarded . . . according to the best interest of the children There shall be a rebuttable presumption that joint custody is in the best interest of a minor child"

tent with the legislature's apparent intention to insure that joint custody will be awarded in accordance with the child's best interest.

It is not clear which interpretation of the presumption and its exceptions the legislature intended.²⁹ Further legislative action is needed to clarify the meaning of article 146. Nevertheless, the new law will be analyzed herein under the premise that there is an effective presumption in favor of joint custody.

The Definition of Joint Custody

Article 146(D) states in part: "For purposes of this Article, 'joint custody' shall mean the parents shall share the physical custody of children of the marriage, subject to any plan of implementation effected pursuant to Paragraph A of this Article, and shall enjoy the natural cotutorship of such children in accordance with Article 250." Prior to amendment, articles 146 and 157 allowed but did not require joint custodial parents to share physical custody.³⁰ The definition of joint custody in amended article 146 changes the law to require that joint custodial parents share physical custody. Although the change is significant, it is mitigated by the limitation subjecting the requirement of shared physical custody to any plan for implementation of joint custody. Since article 146(A)(1) expressly permits the joint custody plan to specify a domicile for the child,³¹ an equal sharing of physical custody is not required. On the other hand, a custodial parent is prevented from monopolizing physical custody by the article 146(D) requirement that "[p]hysical care and custody shall be shared by the parents in such a way as to assure a child of frequent and continuing contact with both parents." Thus, joint custody means that at a minimum, both parents shall have frequent and continuing contact with the child.

Joint custody also means that the parents are natural cotutors of the child. Cotutorship obligates each of the parents to rear and educate the child in accordance with his station in life.³² It also requires the parents to act as prudent administrators of the child's property, to enforce all obligations in the child's favor, and to represent the child in all civil matters.³³ Although the parents will automatically share these responsibilities equally, they may redistribute the obligations of cotutorship by agreement, subject to approval of the

29. The legislative history of the bill does not indicate that the legislature noticed any ambiguity in the wording of article 146.

30. LA. CIV. CODE arts. 146(B) & 157(B) (as amended by 1981 La. Acts, No. 283, § 1).

31. See *infra* notes 39 & 40 and accompanying text.

32. LA. CODE CIV. P. art. 4261.

33. LA. CODE CIV. P. art. 4262 (as amended by 1982 La. Acts, No. 307, § 2).

court awarding joint custody.³⁴ In addition, the court may modify the cotutorship on its own motion.³⁵ Regardless of how the cotutorship is modified, however, "[a]n award of joint custody obligates the parties to exchange information concerning the health, education, and welfare of the minor child."³⁶

"[U]nless allocated, apportioned, or decreed, the parents or parties shall confer with one another in the exercise of decision-making rights, responsibilities, and authority."³⁷ Apparently, an agreement between the parents is not required in cases where the right or responsibility has already been "allocated, apportioned, or decreed," and it will be sufficient if the acting parent consults with the other parent.

The Presumption and the Best Interest Standard

The presumption that joint custody is in the best interest of the child will probably change the factors which traditionally have been considered in determining the best interest of the child. As already noted, the presumption is contrary to the judicially expressed preference for stability of environment and undivided parental authority.³⁸ Once the presumption is effective, the importance of these factors, as they traditionally have been applied, should decrease in deference to the legislation. However, the legislative history of Act 307 indicates that both factors should still be given significant weight. The original bill was amended to allow (but not require) the joint custody plan to specify "domiciliary arrangements."³⁹ The legislative history establishes that "domiciliary arrangements" refers to a single residence,⁴⁰ an indication that the legislature intended to permit the child in a joint custody arrangement to have one home. If this is the case, the judicial preference for stability of environment and undivided parental authority may still be important. Because of their

34. LA. CIV. CODE art. 250 (as amended by 1982 La. Acts, No. 307, § 1) provides, in pertinent part:

[I]f the parents are awarded joint custody of a minor child, then the cotutorship of the minor child shall belong to both parents, with equal authority, privileges, and responsibilities, unless modified by order of the court or by an agreement of the parents, approved by the court awarding joint custody.

35. LA. CIV. CODE art. 250.

36. LA. CIV. CODE art. 146(D).

37. LA. CIV. CODE art. 146(D).

38. See *supra* notes 14-17 and accompanying text.

39. Compare La. H.B. 1194, 8th Reg. Sess. (1982) (as introduced) with La. H.B. 1194 8th Reg. Sess. (1982) (as enrolled) (showing that the bill was amended to allow the joint custody plan to specify domiciliary arrangements).

40. This is evident from the hearing on La. H.B. 1194 which was held before the House Committee on Civil Law and Procedure. (Recordings of this hearing were made.)

preference for a "one home" situation, Louisiana courts may require that joint custody plans minimize instability of environment. The same policy may result in a limitation on the division of parental authority, since the parent with whom the child is domiciled will naturally assume responsibility for many of the day-to-day decisions which, as a practical matter, cannot be decided by both parents.⁴¹

Despite the legislative history and jurisprudence, domiciliary arrangements in the joint custody plan are merely optional, and nothing in article 146 prohibits an equal sharing of physical custody. A child, in effect, may have two homes because the statutory definition of joint custody requires parents to share custody "in such a way as to assure a child of frequent and continuing contact with both parents."⁴² Indeed, this provision may limit the extent to which the courts can allow the child to have a single domicile. Hence the interpretation of "frequent and continuing" will be critical.

The determination in prior jurisprudence of the point at which joint custody begins⁴³ might be utilized to define "frequent and continuing." The maximum amount of contact previously allowed in a sole custody arrangement with liberal visitation could be considered the minimum necessary for the frequent and continuing contact required when joint custody is awarded. This interpretation of "frequent and continuing" should be made cautiously, however, because, in establishing the requirements of joint custody, the legislature may not have considered the nature of custody arrangements which previously had been judicially prohibited.

Another factor which may become less important under the new law is the relative fitness of the parents. The requirement that the court "inquire into the fitness of both the mother and father"⁴⁴ has been removed from article 146. Although parental fitness⁴⁵ is surely still relevant to the best interest of the child, its importance may decrease for several reasons.⁴⁶ The presumption in favor of joint custody eliminates the need for each parent to prove that he or she

41. An effort by the courts to minimize instability of environment and division of parental authority would be supported by the commentaries of a number of writers. One of the chief criticisms of joint custody is the so-called "yo-yo effect" it produces. See Comment, *supra* note 2, at 94.

42. LA. CIV. CODE art. 146(D).

43. See *supra* notes 16 & 17 and accompanying text.

44. LA. CIV. CODE art. 146(A) (prior to amendment by 1982 La. Acts, No. 307, § 1).

45. Parental fitness has been interpreted to mean moral, physical, mental, and economic fitness. See Comment, *supra* note 2, at 104.

46. In recent years the "fitness" requirements, particularly those for "moral fitness," have become less important. See *Cleeton v. Cleeton*, 383 So. 2d 1231 (La. 1980); *Monsour v. Monsour*, 347 So. 2d 203 (La. 1977).

is more fit than the other parent.⁴⁷ When joint custody is awarded, it does not matter which parent is "more fit," so long as both are fit. Furthermore, a parent seeking sole custody may be discouraged from attacking the fitness of the other parent since article 146 requires that a court awarding sole custody consider which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent.⁴⁸ An attack upon the fitness of the other parent, especially an unwarranted attack, is likely to be perceived as an unwillingness to cooperate with the other parent or to allow the other parent to have frequent access to the child.⁴⁹ Thus, such an attack could prove to be contrary to the interest of the parent seeking sole custody.

An interesting result of the new law is the possibility of awarding joint custody when neither parent is fit for sole custody.⁵⁰ Since the parents have greater rights to the child than nonparents, the court in most cases will be required to award either joint or sole custody.⁵¹ A situation may occur in which, although neither parent is fit for sole custody, both parents are fit for joint custody. Since joint custody requires a sharing of custody, it may be less demanding on each parent than sole custody.⁵² Thus, a parent marginally unfit for sole custody may be fit for joint custody. In this instance the court cannot reject an award of joint custody to the parents because the court finds that an award to a nonparent would be in the best interest of the child, for article 146(B) specifically provides that custody cannot be awarded to a nonparent unless an award to a parent would be "detrimental" to the child. Thus, joint custody will be awarded when neither parent is particularly fit for sole custody, even though a third party is fit, if joint custody will not be detrimental to the child.

In addition to decreasing the importance of certain factors, the presumption in favor of joint custody is likely to require consideration of some new factors.⁵³ For example, Louisiana courts will have

47. See, e.g., *Cooley v. Cooley*, 411 So. 2d 750 (La. App. 3d Cir. 1982); *Jowers v. Jowers*, 393 So. 2d 790 (La. App. 2d Cir. 1981).

48. LA. CIV. CODE art. 146(A)(2).

49. J. Cook, *Joint Custody, Sole Custody: A New Statute Reflects a New Perspective*, 18 CONCILIATION CTS. REV. 31 (1980). The author of this article is the president of the Joint Custody Association which drafted the model law upon which Civil Code article 146 is based. The provision in question was designed to encourage joint custody, whether or not it has that effect.

50. See generally Comment, *supra* note 2, at 104-105.

51. LA. CIV. CODE art. 146(B). See the discussion of the order of preference in *supra* notes 10 & 11 and accompanying text.

52. M. MORGENBESSER & N. NEHLS, JOINT CUSTODY 66-68 (1981).

53. For a number of relevant factors, see generally MICH. COMP. LAWS ANN. § 722.26a (Supp. 1982); 1982 Fla. Sess. Law Serv. 96 (West); *Beck v. Beck*, 86 N.J. 480, 432 A.2d 63 (1981); Comment, *supra* note 2, at 104-05.

to consider the capacity of the parents to cooperate in child-rearing.⁵⁴ Another important factor will be the logistical or practical arrangements of the joint custody plan.⁵⁵ Although not determinative, practical considerations, such as geographical location and integration of custody arrangements with work and school schedules, will be important in deciding what is in the child's best interest.⁵⁶ Finally, it will be important to consider the chance of a dispute arising which could not be settled without⁴ an adverse effect on the child.

Joint Custody Plans

Article 146(A) provides in part:

[C]ustody shall be awarded in the following order of preference, according to the best interest of the children: (1) To both parents jointly. The court, shall, unless waived by the court for good cause shown, require the parents to submit a plan for implementation of the custody order, or the parents acting individually or in concert may submit a custody implementation plan to the court prior to issuance of a custody decree.⁵⁷

Does this mean that the court is required to order submission of a plan only *after* joint custody is ordered, or does it mean that the plan should be ordered when the court is considering an award of joint custody? The former interpretation is at least plausible. The provision in article 146(A) that the court "require the parents to submit a plan for implementation of the custody order" implies that the court need only require a plan after there has been a custody order. This interpretation is supported by the language which allows parents to submit a plan "prior to issuance of a custody decree." It would be unnecessary to give special permission to the parents to submit a plan prior to the custody order if, at the same time, the court was already bound to require the parents to submit a plan. The latter

54. This factor would be related to the nature of the parents' personal relationship, but not coextensive with it. See *Beck v. Beck*, 86 N.J. 480, 432 A.2d 63 (1981). Given the presumption that joint custody is in the best interest of the child, the court can not assume that just because the marriage failed the parents cannot cooperate and thus joint custody is not in the best interest of the child.

55. For a discussion of whether the court can order drafting of the joint custody plan before it considers whether joint custody is in the child's best interest, see text at *infra* notes 57 & 58.

56. M. MORGENBESSER & N. NEHLS, *supra* note 52, at 99-100; M. WHEELER, *DIVIDED CHILDREN* 80-81 (1980).

57. The original bill did not require the court to order submission of a plan, but allowed the court to order a plan in its discretion. La. H.B. 1194, 8th Reg. Sess. (1982) (as introduced).

The Nevada statute simply provides that the court may require a plan to be submitted "when appropriate." NEV. REV. STAT. § 125.136 (1981).

interpretation—the court must order that a plan be submitted when it is considering joint custody—is a better interpretation, however, as a matter of policy. This interpretation would allow the court to examine the specific terms of the plan when deciding whether joint custody is in the child's best interest.⁵⁸ Consistent with this interpretation, the provision allowing the parents to submit their own plan(s) could be considered a safeguard for parents who desired to submit a plan but were prevented by the trial judge, who persisted in finding "good cause" not to order submission of the plan. In addition, permitting the parents to submit a plan on their own initiative allows them an opportunity to show their ability to cooperate—a factor which will be important in determining whether joint custody is in the child's best interest. Thus, because the latter interpretation can be rationalized and because it is more consistent with the general provision that custody be awarded in accordance with the best interest of the child, article 146 should be interpreted as directing the court to require a joint custody plan when the court is considering an order of joint custody.

The court, "for good cause shown," may waive the requirement that it order submission of a plan. A general definition of "good cause" is difficult to formulate⁵⁹ and usually depends on the statute in which the phrase is used, as well as the particular facts of each case.⁶⁰ Good cause to waive the requirement of a joint custody plan could result from a number of different fact situations. There may be good cause not to order a plan if the parents have already agreed to a suitable plan, or where the court determines that the parents would not agree to a suitable plan. In the latter instance, the court may still develop a plan of its own since nothing in article 146 precludes the court from imposing its own joint custody plan on the parents if required for the child's best interest. Although the need for parental cooperation would seem to require that the parents formulate their own plan, at least one writer has argued that joint custody ordered by the court is no more prone to failure than sole custody ordered by the court.⁶¹ In any event, the threat of the court imposing a plan may encourage the parents to compromise and submit their own plan.

58. A poorly drafted joint custody plan may result in the failure of the joint custody arrangement, a result which is not in the child's best interest. See, e.g., *Marriage of Heinel & Kessel*, 55 Or. App. 275, 637 P.2d 1313 (1981).

59. See Justice Summers' dissent from the refusal to grant writs in *Dugas v. Continental Cas. Co.*, 249 La. 843, 191 So. 2d 642 (1966). The majority's decision to refuse to grant writs is at 249 La. 763, 191 So. 2d 141.

60. *Wray v. Folsom*, 166 F. Supp. 390 (W.D. Ark. 1958).

61. Folberg & Graham, *Joint Custody of Children Following Divorce*, 12 U.C.D. L. Rev. 523, 579 (1979).

Two provisions in article 146 relate generally to the contents of joint custody plans. When there is joint custody, "physical care and custody shall be shared by the parents in such a way as to assure a child of frequent and continuing contact with both parents."⁶² This language prohibits joint custody plans which would prevent frequent and continuing contact. Whatever meaning is ultimately attributed to "frequent and continuing" will limit the contents of joint custody plans.⁶³

In addition to the requirement of frequent and continuing contact, the legislation specifically permits four "considerations" to be included in joint custody plans: (1) domiciliary arrangements, (2) rights of access and communication, (3) child support, and (4) any other matter deemed to be in the child's best interest.⁶⁴ The legislation does not *require* that any of these considerations be included in a joint custody plan. Article 146 simply provides that a plan *may* include these considerations. It is especially important that the domiciliary consideration is permissive, since it is limited by the requirement of frequent and continuing contact.

Each of the first three considerations is intended to allow specific elements to be included in the joint custody plan. The domiciliary consideration simply pertains to the possible establishment of a single home for the child.⁶⁵ The consideration of rights of access and communication allows provisions implementing the requirement of frequent and continuing contact between parent and child. In addition to custody terms, the rights might include allowing a joint custodial parent to communicate with his child who is in the physical custody of the other parent. The child support consideration was added to indicate that an award of joint custody does not preclude an award of child support to one of the parents.⁶⁶ The last consideration is a catchall which indicates that the contents of a plan are not limited by the enumeration of considerations in article 146, and anything relevant to the child's best interest can be admitted. Examples of other considerations which might be included in a plan are provisions accommodating the wishes of the child or designating a mediator or

62. LA. CIV. CODE art. 146(D).

63. The requirement relates to custody, not the custody plan, and thus there is not an explicit requirement that the plan contain provisions which will assure frequent and continuing contact. Since custody of that nature is required, however, it would seem reasonable for the court to require the plan to contain provisions which assure frequent and continuing contact.

64. LA. CIV. CODE art. 146(A)(1).

65. See *supra* notes 39 & 40 and accompanying text.

66. This is evident from the recorded hearing on La. H.B. 1194 before the House Committee on Civil Law and Procedure.

arbitrator in the event disputes arise.⁶⁷ Naturally, the central part of each plan will state the times the child will spend with each parent, but a plan should also establish a division of decision-making rights and responsibilities to the extent necessary for the best interest of the child.⁶⁸ A carefully drafted plan will prevent the occasion of many situations which are harmful to the child.⁶⁹

Enforcement of Joint Custody Decrees

If a dispute arises following the decree of joint custody, there are two alternatives for the parents. They can return to court, in which case each party will try to enforce his or her version of the plan, or either or both parties will petition for sole custody. The other alternative is a nonjudicial resolution of the dispute. The latter alternative is preferable as an initial means of dispute resolution because it avoids an adversary court proceeding that places the joint custodial parents in conflict. A nonjudicial proceeding would allow the possibility of dispute resolution which promotes cooperation.⁷⁰ Furthermore, a nonjudicial approach would more readily accommodate resolution of minor disputes, possibly preventing them from becoming major disputes.⁷¹

In testimony before the legislature, mediation and arbitration were discussed as preferable methods of resolving these disputes that arise in joint custody situations.⁷² Mediation involves designation of a mediator who would aid the parties in reaching settlement when disputes arose. Arbitration also involves a third party, but in arbitration the parents would agree to abide by the decisions of the arbitrator rather than attempt to reach their own settlement. Of these two options, mediation is preferable because the parents would settle the dispute themselves, with the help of the mediator, and thus would be more likely to abide by the settlement. Arbitration, which involves the imposition of a decision on the parents, is less likely to result in an acceptable settlement. Arbitration, however, would have the benefit of keeping the parties out of court, where there is little chance

67. M. MORGANBESSER & N. NEHLS, *supra* note 52, at 102-03; M. WHEELER, *supra* note 56, at 82-83.

68. Although upon the award of joint custody the rights and responsibilities of tutorship will automatically be shared equally, that division of authority can and should be modified in accordance with the child's best interest. See note 34, *supra*.

69. Examples of joint custody agreements can be found at 1 A. LINDEY, SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS, Forms 14.04, 14.05, 14.11 (1982); M. MORGANBESSER & N. NEHLS, *supra* note 52, at 104-10.

70. M. WHEELER, *supra* note 56, at 206-07.

71. *Id.* at 82.

72. This is established in the recorded hearing on La. H.B. 1194 before the House Committee on Civil Law and Procedure.

for cooperation and where both parties will be tempted to pursue sole custody on the grounds that joint custody has not been successful.

If judicial resolution of disputes becomes necessary, several alternative means of enforcement are available. Either party could request the court to hold the other party in contempt for violating the custody order. Although it seems unlikely that holding an uncooperative joint custodial parent in contempt will produce a result that is in the best interest of the child, contempt, nonetheless, may be used since it has been recognized in the past as a means of enforcing visitation privileges.⁷³

If the parents agree to submit a joint custody plan and the court includes that plan in its judgment awarding joint custody, one of the parents may attempt to enforce the plan as a contract.⁷⁴ This would involve seeking specific performance or, more probably, damages.⁷⁵ It is not clear, however, whether the agreement will be enforceable as a contract. There is some indication in the jurisprudence that custody is a matter of public order which cannot be the subject of a contract.⁷⁶ Furthermore, amended article 146 does not treat the agreement as a contract in that the joint custody plan can be modified by the court upon its own motion.⁷⁷ This differs from other contracts between spouses, such as matrimonial agreements, which, although subject to court approval in some instances, cannot be modified by the court.⁷⁸ In addition, it is questionable whether contractual liability between the parents is appropriate, since custody usually involves an already volatile situation. The existence of a contract would encourage litigation and cause some parents to overreact to otherwise harmless deviations from the plan. Fear of such litigation might undermine the possibility of sincere cooperation between the parents. Finally, a contract would limit the flexibility of the actual custody arrangement by encouraging strict adherence to the plan regardless of changes in circumstances. For these reasons, treating the agreement as a contract would be inconsistent with the best interest of the child, which, after all, is the primary goal of the legislation.

73. See *Fouchi v. Fouchi*, 391 So. 2d 1352 (La. App. 4th Cir. 1980), *writ denied*, 396 So. 2d 918 (La. 1981), in which the court indicated that the father's recourse against the mother, who would not always allow visitation in accordance with the court order, was to request a contempt citation against the mother.

74. If the parents do not *voluntarily* agree to the plan, there is no basis for a claim in contract.

75. LA. CIV. CODE arts. 1905, 1926, 1927 & 1934(3).

76. See *Roy v. Speer*, 249 La. 1034, 192 So. 2d 554 (1966); *Farr v. Emuy*, 121 La. 91, 46 So. 112 (1908); *Cenac v. Power*, 211 So. 2d 408 (La. App. 1st Cir. 1968); see also LA. CIV. CODE arts. 1893 & 1895.

77. LA. CIV. CODE art. 146(E).

78. LA. CIV. CODE art. 2329.

Nonetheless, a strong argument can be made that custody agreements, to a limited extent, should be enforceable as contracts. The Louisiana Supreme Court has held that an agreement suspending child support payments is binding if the agreement is in the best interest of the child and has all the other elements of a conventional obligation.⁷⁹ Thus, contracts as to child support are not prohibited per se and may be binding if not contrary to public policy. Other jurisdictions adopt the same rationale with respect to custody arrangements.⁸⁰ The general principle in these jurisdictions is that the parties cannot bind the court by their agreement, but if the court finds that the agreement is in accord with public policy, the agreement will be enforced. By analogy to the child support jurisprudence, Louisiana courts could follow other jurisdictions and allow those custody contracts which are not contrary to public policy. The limits of public policy, of course, would be dictated by the best interest of the child under article 146.

No entirely adequate method of enforcing custody agreements exists. As a result, joint custody may be difficult to maintain except where both parents desire it. The inadequacy of judicial enforcement of joint custody may also undermine the arbitration and mediation alternatives. Parents will realize that they have nothing to lose by failing to settle their disputes by arbitration or mediation, since if joint custody fails the court is likely to award sole custody, rather than attempt to enforce its joint custody order. The ultimate effect of the enforcement problem may be to discourage joint custody awards.

Custody Awards to Nonparents

Prior to the amendment of article 146, the legislation did not recognize the possibility of custody awards to nonparents. The problem arose in several cases, however, which established the jurisprudential rule that parents had a paramount right to custody and custody could not be awarded to a nonparent unless both parents were unfit, unwilling, or unable to accept custody.⁸¹ Under this rule, courts were hesitant to award custody to a nonparent, even when such award was in the best interest of the child.⁸²

79. *Dubroc v. Dubroc*, 388 So.2d 377 (La. 1980).

80. *Crocker v. Crocker*, 195 F.2d 236 (10th Cir. 1952); *Bleck v. Bleck*, 1 A.D.2d 839, 148 N.Y.S.2d 786 (1956); *Ford v. Ford*, 242 S.C. 344, 130 S.E.2d 916 (1963); *King v. King*, 29 Wis. 2d 550, 131 N.W.2d 357 (1964); RESTATEMENT (SECOND) OF CONTRACTS § 191 (1981).

81. See *Jones v. Jones*, 415 So. 2d 300 (La. App. 2d Cir. 1982); *Deville v. LaGrange*, 388 So. 2d 696 (La. 1980); *Wood v. Beard*, 290 So. 2d 675 (La. 1974).

82. See *Smith v. Johnson*, 415 So. 2d 291 (La. App. 2d Cir. 1982); *Burt v. McKee*, 384 So. 2d 489 (La. App. 2d Cir. 1980); *LaCroix v. Cook*, 383 So. 2d 59 (La. App. 2d Cir. 1980).

The provisions of amended article 146 replace the jurisprudential rule. Article 146, in pertinent part, provides:

[C]ustody shall be awarded in the following order of preference, according to the best interest of the children:

. . . .

. . . (3) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.

(4) To any other person or persons deemed by the court to be suitable and able to provide an adequate and stable environment. Before the court makes any order awarding custody to a person or persons other than a parent without the consent of the parents, it shall make a finding that an award of custody to a parent would be detrimental to the child and the award to a nonparent is required to serve the best interest of the child.

The essence of the change is that rather than finding that both parents are unfit, unwilling, or unable, the court must now find that parental custody would be detrimental to the child. Whether the law has changed, as a practical matter, is not clear. Although custody that would be detrimental to the child would include custody with a parent who was unfit, unwilling, or unable, there is no indication of whether any other situation would be included in the definition of "detrimental." To the extent that other situations are included, the new law reduces the standard for awarding custody to nonparents.

Rights of Noncustodial Parents

In conjunction with the custody provisions already discussed, article 146(H) states that "[N]otwithstanding any other provision of law, access to records and information pertaining to a minor child, including but not limited to medical, dental, and school records, shall not be denied to a parent because the parent is not the child's custodial parent." Thus, in addition to visitation rights, the noncustodial parent has a continuing right to be informed of the child's welfare. This new right recognizes that the noncustodial parent has a constant interest in the child, and this right is consistent with the general tenor of article 146 in that it acknowledges that, despite the breakdown of the marriage, a child still has two parents.

Conclusion

The apparent purpose of the new law is to curb the dominant position of the parent with sole custody. The main aspect of the legislature's effort to achieve this goal is the preference of joint

custody over sole custody. However, regardless of whether one accepts or rejects the idea of joint custody and the legislature's purpose in imposing it, the new legislation is disappointing. The law is unclear in many places and borders on being internally inconsistent in others. Since any advantages that might have been gained may well be lost in the imprecision of the new law, the legislature should act to amend and clarify it.⁸³

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83. A problem beyond the scope of this note but worthy of mention is the absence of a requirement that joint custody be awarded only to parents domiciled within the state. Prior to amendment in 1982, Civil Code articles 146 and 157 contained such a requirement. The new law may cause practical problems since it allows custody to be awarded to parents who live great distances apart. It may also cause jurisdictional problems. *See generally* LA. R.S. 13:1700-1724 (Supp. 1978) (Uniform Child Custody Jurisdiction Law); Bodenheimer & Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C.D. L. REV. 227 (1979).